DATE: August 31, 1998

CASE NO: 98-INA-54

In the Matter of

CHINA GOURMET, INC.
Employer

on behalf of

OI-KWAN LUI
Alien

Appearances: Paul Gon Foo Wong, Esq.
For Employer

Before: Holmes, Jarvis, and Vittone
Administrative Law Judges

DONALD B. JARVIS
Administrative Law Judge

DECISION AND ORDER

This case arises from China Gourmet Inc.'s ("Employer") request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of an application for alien labor certification. The certification of aliens for permanent employment is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under §212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of the United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other means in order to make a good faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in the appeal file ("AF"), and any written arguments. 20 C.F.R. §656.27(c).

Statement of the Case

On August 21, 1996, the Employer filed a Form ETA 750 Application for Alien Employment Certification with the Rhode Island Department of Labor and Training ("RIDOLT") on behalf of the Alien, Oi-Kwan Lui. (AF 30). The job opportunity was listed as "Manager, Chinese restaurant". The job duties were described as follows:

> To supervise and coordinate activities of workers; to schedule work; to investigate and resolve food quality and service complaints; to confer with chefs in planning menus etc.

(Id.). The stated job requirements for the position, as set forth on the application, included a Bachelor of Arts degree. Special requirements included knowledge of the Chinese language. (Id.).

RIDOLT transmitted resumes from 1 U.S. applicant to the Employer. The applicant was not hired. The file was transmitted to the CO. (AF 18-19).

The Employer included a signed statement from its President, Chi Wei Weng, with its application dated August 19, 1996. All of the kitchen employees speak only Chinese. The President speaks very little English. (AF 29).

The CO issued a Notice of Findings ("NOF") on May 9, 1997, proposing to deny certification because the foreign language requirement is unduly restrictive in violation of Section 656.21(b)(2)(i)(C). (AF 15-17). The CO requested that the Employer either delete the requirement or establish a business necessity. (AF 16).

The Employer submitted its rebuttal dated June 10, 1997. (AF 6-14). Included were affidavits from two of the Employer's cooks which stated that they only speak Chinese at work and that their English is very poor. (AF 7-8). The Employer's President stated in his affidavit that his English is very limited and that all of the kitchen employees only speak Chinese. The manager must be able to speak Chinese in order to communicate with the kitchen staff and the President. In addition, many of the Employer's customers speak Chinese. (AF 9). The Employer also submitted copies of its menus which are in both English and Chinese, and guest checks in Chinese. (AF 11-14).

On June 17, 1997, the CO issued a Final Determination ("FD") denying certification because the Chinese language requirement was unduly restrictive and not supported by a business necessity. (AF 4-5).

The Employer filed a timely Request for Review dated July 15, 1997. (AF 1-3).

Discussion

In the NOF, the CO found that the Chinese language requirement was unduly restrictive. As such , the CO directed the Employer to either delete the requirement or establish a business necessity. The CO stated:

> In order for a requirement, or set of requirements to qualify as arising from business necessity an employer must demonstrate by sufficiently [sic] documentation that because of the peculiar circumstances of the particular case the duties described can only be performed by some [sic] who meets the cited excessive and restrictive requirements thereby making them a business necessity.

(AF 16).

The CO's instructions for establishing a business necessity are confusing and flawed. Section 656.21(b)(2)(i)(C) provides that the job opportunity shall not include a requirement for a language other than English unless that requirement is adequately documented as arising from business necessity. In order to establish a "business necessity" for the unduly restrictive requirement, the employer must document: 1) that the requirement bears a reasonable relationship to the occupation in the context of the employer's business; and 2) that the requirement is essential to performing, in a reasonable manner, the job duties as described by the employer. *Information Industries, Inc.*, 88-INA-82 (Feb. 9, 1990) (*en banc*). The *Information Industries* standard, in the context of a foreign language requirement, has been adapted to 1) whether the employer's business includes clients, co-workers or contractors who speak a foreign language, and what percentage of the employer's business involves this foreign language, and 2) whether the employee's job duties require communicating or reading in a foreign language. *Scala Furniture*, 91-INA-282 (Nov. 30, 1992); *Raul Garcia, M.D.*, 89-INA-211 (Feb. 4, 1991); *Splashware Company*, 90-INA-38 (Nov. 26, 1990). The NOF must give notice which is adequate to provide the employer an opportunity to rebut or cure the alleged defects. *Downey Orthopedic Medical Group*, 87-INA-674 (Mar. 16, 1988) (*en banc*). Here, the CO's instructions fail to specify the correct standard.[1] As such, the Employer was deprived of the opportunity to fully rebut the CO's findings.

In sum, we find that the NOF was defective. The CO should issue a supplemental NOF giving the Employer the option of either deleting the language requirement or establishing a business necessity. The 2 prong *Information Industries* business necessity standard should be cited. We also

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[1]While not required, it would be helpful if the CO requested specific information from the Employer in order to insure that the relevant issues are addressed in rebuttal, rather than relying on a general request that the Employer rebut the findings.

suggest that the CO should request specific information regarding the language capabilities of all of the Employer's employees and inquire into whether the Employer's past manager spoke Chinese.

Order

The Final Determination denying certification is hereby vacated, and the case is **REMANDED** back to the Certifying Officer for further action consistent with this opinion.

For the Panel:

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DONALD B. JARVIS
Administrative Law Judge

San Francisco, California